

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA WAGGONER

Claimant

VS.

CASEY'S GENERAL STORE

Respondent

Self-Insured

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Docket No. 255,959

ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's August 1, 2000, preliminary hearing Order.

ISSUES

Claimant requested temporary total disability benefits and medical treatment for an alleged work-related back injury. Claimant claims she initially injured her back at work on January 17, 2000, while lifting cases of soda pop. Claimant further alleges that her back symptoms worsened as she continued to perform her regular work duties of standing, loading ice bags, and unloading trucks through her last day worked of March 22, 2000.

The Administrative Law Judge denied claimant's request for preliminary benefits. The Administrative Law Judge found claimant had failed to prove she suffered an accidental injury while working for the respondent.

On appeal, claimant contends her testimony and the medical records, admitted into evidence at the preliminary hearing, prove her current back condition is directly related to her employment with respondent.

In contrast, respondent requests the Appeals Board to affirm the Administrative Law Judge's preliminary hearing Order that denied claimant's request for preliminary benefits. Respondent contends claimant's testimony as to how she injured her back at work is not consistent with the medical history she provided treating physicians and is contradictory to the testimony as provided by her supervisor, Traci Morris.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Appeals Board finds that the Administrative Law Judge's preliminary hearing Order should be affirmed.

Claimant claims she initially injured her back on January 17, 2000, while she was cleaning out the walk-in cooler at respondent's store located in Independence, Kansas. Claimant testified her back started hurting as she was moving soda pop cases. After taking a short cigarette break, claimant immediately notified her supervisor, Traci Morris, who was at that time present in the store, that she had hurt her back moving soda pop cases. Claimant further testified that Ms. Morris told her if her back got any worse to go to the doctor.

Claimant continued to work and testified her back symptoms worsened as she stood on her feet, bagged ice, and unloaded trucks. Finally, because her back symptoms had worsened, claimant testified that Ms. Morris told her to go see a doctor.

Claimant first sought medical treatment with a chiropractor. But she testified that Ms. Morris told her to go to a "real doctor". Claimant then sought medical treatment through her family physician, Bradley H. Barrett, M.D.

Dr. Barrett's medical records indicate he first saw claimant with back complaints on February 11, 2000. Claimant gave Dr. Barrett a history of back and leg pain present for two months. Claimant also indicated "No injuries". Dr. Barrett diagnosed claimant with lumbosacral back pain and referred claimant for a nerve conduction study. The nerve conduction study showed no nerve compression. The doctor prescribed pain medication and physical therapy. He placed claimant on light work restrictions of no lifting over 15 pounds, no standing over one hour at a time, and standing limited to six hours per day. Respondent accommodated those restrictions.

Because claimant was not improving, she saw Dr. J. E. Block's physical assistant, Jack Bell, on March 10, 2000. Mr. Bell's medical note of that same date indicates claimant gave him a history that her back pain started the first part of the year when she sat down and her back "gave a little bit". Mr. Bell continued claimant on light duty. After an MRI examination, Mr. Bell decided claimant needed to see an orthopedic surgeon and referred her to Ervin Howell, M.D.

Dr. Howell first saw claimant on March 22, 2000. His medical record of that date indicates claimant provided a history of feeling "something sort or (sic) give in her back and it sort of collapsed" while on break at work for respondent. The doctor diagnosed degenerative disc disease, continued claimant in physical therapy but added pelvic traction, and continued pain medication. He took claimant off work. Dr. Howell continued to treat claimant through May 31, 2000. Because claimant had not improved with conservative treatment, Dr. Howell recommended claimant undergo lumbosacral arthrodesis surgery.

At claimant's attorney's recommendation, the last physician that the preliminary record indicates that she saw for her back problems was Bryan K. Ellefsen, D.O. Dr. Ellefsen saw claimant on June 22, 2000. In a letter dated June 22, 2000, to claimant's attorney, the doctor indicates that claimant related a history of injuring her back on or about January 17, 2000, while employed by the respondent moving cases of soda. According to the doctors' written records, this is the first time claimant related a history to a physician that she hurt her back moving soda pop cases at work. Dr. Ellefsen diagnosed claimant with degenerative disc disease at L5-S1 with S1 radiculopathy on the left. He recommended claimant undergo epidural steroid injections and for claimant to participate in a structured physical therapy program. If claimant did not respond to this treatment regimen, the doctor recommended consideration of a fusion of L5-S1. Dr. Ellefsen went on to opine that claimant's back injury was the direct result of claimant moving soda pop cases at work on January 17, 2000.

The respondent had Traci Morris, it's area supervisor and claimant's supervisor on the date of the accident, testify at the preliminary hearing before the Administrative Law Judge. Ms. Morris testified the first time she knew claimant was claiming she had hurt her back moving soda pop cases while working for the respondent was when she heard claimant's testimony at the preliminary hearing. Ms. Morris testified the first time she knew that claimant had back complaints was when "[s]he told me she was standing in the back room smoking a cigarette and it felt like her rib cage dropped."

At the direction of her supervisor, Ms. Morris completed an Employer Accident Report on March 9, 2000. At that time, claimant had already been to see the chiropractor and her family physician, Dr. Barrett, concerning her continuing back complaints. Claimant assisted in completing the Employer's Accident Report and did not argue the fact that the accident report contained a description of the accident occurring when claimant was in the back room smoking a cigarette and felt pain in her back. Ms. Morris specifically denied that claimant ever indicated she hurt her back while moving pop cases. According to Ms. Morris' testimony, claimant did not say that her back worsened as she continued to work and perform duties that required her to stand, bag ice, and unload trucks. Ms. Morris denied she directed claimant to certain physicians for medical treatment. Ms. Morris did recommend certain doctors as a friend but did not make any recommendations based on claimant having a work-related injury.

Claimant was also asked why she didn't tell Ms. Morris that her back injury occurred while moving pop cases. Claimant replied, "I didn't know it was relevant".

As noted above, there is definitely conflicting testimony in this case. The claimant and respondent's representative, area supervisor Traci Morris, both testified in person before the Administrative Law Judge. Their testimony is in direct conflict with each other. Thus, credibility is at issue. The Administrative Law Judge had the opportunity to assess the witnesses' demeanor. In this case, the Administrative Law Judge did not believe the claimant and denied her request for preliminary benefits. Under this circumstance, where

conflicting testimony exists, the Appeals Board finds some deference should be given to the Administrative Law Judge's evaluation of the credibility of the witnesses. The Appeals Board, therefore, taking into consideration the Administrative Law Judge's opportunity to assess the credibility of the witnesses, affirms the Administrative Law Judge's decision to deny claimant preliminary benefits based on her failure to prove her accidental injury occurred while working for the respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Jon L. Frobish's August 1, 2000, preliminary hearing Order should be, and it is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2000.

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
Ronald J. Laskowski, Topeka, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director